



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: MARCH 16, 2023

IN THE MATTER OF:

Appeal Board No. 627535

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective September 6, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by FLOWER CITY CHARTER prior to September 6, 2022, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed January 3, 2023 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant worked for the employer as a part-time custodian assigned to a school for about seven months. During the claimant's employment, the owner spoke with the claimant about his unsatisfactory performance on more than one occasion.

On August 31, 2022, the regional manager attempted to give the claimant feedback about his performance. She sent a text to the claimant with a photo of an area of the school and reminded him to clean that area along with his other work. The claimant texted back, "I know my job." The claimant then

called the manager and began to yell and curse at her telling her that she should not tell him what to do. Other employees who were standing near the manager could hear the claimant yelling at her. This interaction brought the manager to tears and she advised the owner of the claimant's conduct. The owner spoke with the claimant about his interaction with the manager; he told the claimant that he was expected to accept feedback regarding his performance and was to speak appropriately and professionally with managers. The owner further advised the claimant that his failure to do so could lead to his discharge.

On September 5, 2022, at about 5 p.m., the claimant called the owner after he was told by other employees that the owner had been checking his work and that the owner believed the claimant was calling the owner a derogatory term. The owner told the claimant that the manager had been told by his mother, who also worked for the employer, that it was the claimant that had called him this term. The claimant became angry when the owner began speaking of his mother.

About two hours after their telephone conversation, the owner approached the claimant to discuss some assigned work which had not been completed. The claimant became irate and in a loud voice, called the owner a "p...y" and a "f...ing joke." The claimant further told the owner to "f... this job" and that he was not doing it. The claimant made these comments in front of another employee. The owner then fired the claimant for the outburst and for continually failing to accept performance feedback.

**OPINION:** The credible evidence establishes that the claimant was discharged when he refused to accept performance feedback and engaged in an outburst in which he used vulgarity directed at his employer. We accept the testimony of the employer witnesses over that of the claimant regarding not only the final incident but also the incident involving the manager which led to the claimant's prior warning. In so finding, we note that the claimant's overall testimony was vague in contrast to the specific and consistent testimony offered by both employer witnesses; the manager about her previous interaction with the claimant leading to the warning and the owner that the final incident was about work-related concerns. While the employer maintained there were many performance issues during the claimant's employment, he was consistent in his testimony that the final incident was the outburst by the claimant when he, once again, refused to accept feedback regarding his performance and used vulgarity.

With respect to the August 31 communications with the manager which the owner testified resulted in a warning, we note that the manager's testimony about her communication with the claimant was corroborated by the text exchange itself. As such, we credit the employer's testimony and evidence in this regard over the claimant's denial to find that the prior incident did occur when the manager was attempting to provide feedback to the claimant and that the owner subsequently warned the claimant that he was expected to accept feedback and to speak appropriately and professionally with his managers or risk discharge.

With respect to the final incident, although the claimant contended that the final conversation was prompted by a matter unrelated to work concerns, his own testimony established that any such conversation took place prior to the final conversation. As such, we credit the employer's testimony that the final conversation was about work-related concerns. The employer's use of feedback to improve work performance is reasonable.

Significantly, the claimant did not contest that he used the vulgar terms as testified to by the owner when describing the final incident. The claimant's refusal to accept feedback coupled with his use of appalling vulgarity directed at his employer within earshot of another employee constitutes insubordination. As such, even in the absence of a prior warning or policy prohibiting such conduct, the claimant should have known that such conduct could result in his discharge. However, the credible evidence herein establishes that the

claimant was warned less than a week before the final incident about accepting feedback and of the employer's expectation that he was to speak appropriately and professionally to managers. As such, we find that the claimant certainly knew that his conduct in the final incident could jeopardize his job. Accordingly, we conclude that the claimant's conduct constitutes misconduct and that his employment, therefore, ended under disqualifying circumstances.

**DECISION:** The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective September 6, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to September 6, 2022, cannot be used toward the establishment of a claim for benefits, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER